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No. _____

In the Supreme Court of the United States

October Term, 1984

ALVIN J. REMMENGA AND SYLVIA REMMENGA,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

APPEAL FROM
COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is it constitutionally permissible for a state to refuse to issue a permit to build one single family home on a parcel of land more than 100 acres in size and more than a mile from the coast unless the property owner pays $5,000 to the state to provide public access to the coast?

2. Is it constitutionally permissible for a state to exact a payment of money as a condition to issuing a permit to build a home when the purpose for which the money is to be used by the state has no rational relationship to the residential use proposed by the property owner?

3. To be constitutionally valid, must a condition imposed by a state to the granting of a permit to build a home be rationally related to the burden on the public which will be created by the property owner's proposed residential use?

4. Is it a denial of equal protection of the law for the California legislature to extort *payment from* one group of property owners to provide coastal access while making *payment to* another group which is otherwise similarly situated?

PARTIES

All parties are listed in the caption.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Court of Appeal (App. A) is reported as *Remmenga v. California Coastal Com.* (1985) 163 Cal App 3d 623, 209 Cal Rptr 628. A modification of the opinion is App. B. The California Supreme Court denied a hearing, with Justices Mosk and Lucas expressing the belief that hearing should have been granted. (App. D)

JURISDICTION

Mr. and Mrs. Remmenga are being required to pay $5,000 as a condition for obtaining a permit to build a modest home on a 106-acre parcel of ranchland. The fee is "in-lieu" of dedicating access to the coast, something which is physically impossible because the subject property is more than a mile inland from the coast. In no way would the Remmengas' proposed home interfere with public access to the coast. Indeed, if each of the neighboring owners of 100+ acre parcels built single-family homes on them (local zoning permits no more), there would be no interference with coastal access.

Mr. and Mrs. Remmenga sought invalidation of the condition pursuant to the Fourteenth Amendment to the United States Constitution, as the condition amounted to confiscation of private property for public use.

Moreover, at another large coastal subdivision, the Legislature decided to *pay* the owners to acquire coastal access. Mr. and Mrs. Remmenga challenged this disparate treatment of otherwise similarly situated parties as a deprivation of equal protection of the laws.

The trial court upheld the constitutionality of the exaction (App. F) and entered judgment in favor of the Coastal Commission. (App. E)

On appeal, the California Court of Appeal affirmed the judgment, concluding that virtually any theoretically available legislative rationalization would suffice to sustain the exaction against consitutional challenge. (App. A)

The judgment of the Court of Appeal was rendered January 14, 1985. (App. A) A modification was made January 17, 1985. (App. B) A timely Petition for Rehearing was denied February 13, 1985. (App. C)

A timely Petition for hearing was filed in the California Supreme Court. After extending its time to act, the California Supreme Court denied a hearing April 25, 1985, with Justices Mosk and Lucas expressing the view that hearing should be granted. (App. D)

A timely Notice of Appeal to this Court was filed July 18, 1985. (App. G)

Jurisdiction of this Court is invoked pursuant to 28 USC §1257(2), because a state statute was challenged as violating the U.S. Constitution and the statute was upheld.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "SECTION 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Cal Pub Res Code §§30610.3 - 30610.8 are reproduced in App. H.

RAISING THE FEDERAL QUESTION

The complaint alleged the invalidity of the $5,000 exaction as a taking of property for public use without compensation, in violation of the Fifth and Fourteenth Amendments. It also challenged the exaction as a violation of the equal protection clause of the Fourteenth Amendment. The federal constitutional questions were

thus raised at the earliest possible time and reiterated in every brief filed in the trial court and on appeal.

STATEMENT OF THE CASE

The Hollister Ranch is a 14,000 acre area of Santa Barbara County which was subdivided and (for the most part) sold as raw acreage years ago.

Mr. and Mrs. Remmenga bought their inland 106-acre lot in Hollister Ranch in 1977. It is more than a mile from the coast.

In 1978, they sought a State Coastal Commission permit to build a small, 1900 square foot single family home on the property. They had already received permission from the local authorities.

In 1979, the Commission granted a permit subject to a condition that the Remmengas—whose property is more than a mile from the coast—provide access *to the coast,* over land owned by other parties.

Litigation ensued over the validity of such an onerous condition. The Superior Court issued a peremptory writ of mandate, commanding the Commission to set aside its decision and reconsider its actions.

The Commission agreed to do so.

Between the original Coastal Commission hearings and the hearings after remand from the Superior Court, the Legislature amended the Coastal Act by adopting Pub. Res. Code §§30610.3 - 30610.8. (See App. H.)

The new provisions sought to guide the Commission in how to coerce "gifts" of coastal access from permit applicants whose projects had no impact on access to the coast and who could not (because of their non-coastal locations) provide access to the coast:

- §30610.3 permitted the Commission to designate subdivided areas that were less than 75% developed and in which individual lot owners could not dedicate coastal access. In such areas, the Commission was permitted to establish a fee to be paid by applicants "in lieu" of dedication of coastal access.
- §30610.8 applied only to Hollister Ranch property and set the "in lieu" fee at $5,000 per permit.

Curiously, while requiring the payment of "in lieu" fees by Hollister Ranch owners, the Legislature simultaneously took precisely the opposite approach at a similar 5200 acre Sonoma County area known as Sea Ranch:

- §30610.3 expressly did not apply to Sea Ranch (Pub. Res. Code §30610.3[g]);
- §30610.6 applied only to Sea Ranch and, instead of requiring property owners to pay "in lieu" fees, the statute required the State to pay the property owners $500,000.

When the Remmengas' application came back before the Commission in 1982, the permit was granted on condition that the $5,000 "in lieu" fee be paid. The Commission was advised by its counsel that the statute permitted no option but to impose the "in lieu" fee.

While they believed the "in lieu" fee was unconstitutional, the Remmengas wanted to finally begin construction of their home, which they had planned since 1977. Their offer to deposit the $5,000 in court, or post a bond, while litigating the validity of the condition, was not acceptable to the Commission. They thus remain

without a home on their hundred acres, nine years after its purchase.

The trial court upheld the propriety and constitutionality of the "in lieu" exaction. (App. E is the judgment. App. F is the Court's Memorandum of Decision.)

The Court of Appeal affirmed in an opinion so broad that virtually *any* exaction could be found permissible. (App. A)

The California Supreme Court (over the protests of Justices Mosk and Lucas) refused to hear the case. (App. D)

Notice of Appeal to this Court was timely filed July 18, 1985 in the California Court of Appeal, Second Appellate District, Division Six. (App. G)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

INTRODUCTION

The opinion below declares the end of private property ownership. If the opinion is permitted to stand, it will allow any government agency to exact any amount of money, for virtually any reason, from any property owner who needs a permit to make use of his land. If property is subject to unlimited monetary exaction as a precondition to use, then there is no right to use.

Right to use is what property is all about. (See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 435 [1982]; *U.S. v. General Motors Corp.*, 323 US 373, 378 [1945].)

The reason for this conclusion is that, while the Court of Appeal pays lip service to the concept that exactions must bear a reasonable relationship to the permit being sought, the facts at bench show no such relationship

exists. The opinion gives any permit-issuing agency carte blanche to assess whatever amount it wills on any pretext its creativity devises.

Two other California cases (one relied on in the case at bench and one relying on it) confirm this conclusion.

In *Georgia-Pacific Corp. v. California Coastal Com.* (1982) 132 Cal App 3d 678, 183 Cal Rptr 395, one of the building blocks of the opinion below (see App. A, p A-6), the trial court had invalidated a coastal access dedication, which had been required as a condition of permit issuance, because the condition was not reasonably related to the nature and impact of the proposed project. The Court of Appeal reversed:

> "A regulatory body may constitutionally require a dedication of property in the interest of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it. [Citations.]" (*Georgia-Pacific,* 132 Cal App 3d at 699)

In *Grupe v. California Coastal Com.* (1985) 166 Cal App 3d 148, the court built on the case at bench, and approved as constitutional a condition that a property owner offer to dedicate a public access easement over two-thirds of his 15,000 square foot lot in exchange for permission to build a single home on the small remainder.

Thus, California, through both her courts and her Legislature,[1] has shown a readiness to totally subordinate

[1]In each of these cases, the courts were enforcing statutory demands for the sacrifice of property rights for the general good of society.

the rights of individual property owners to the needs of the "public." While paying lip service to this Court's protection of private property rights (e.g., App. A, p A-3; *Grupe,* 166 Cal App 3d at 174), California has seized on this Court's non-development of a simple litmus test for what constitutes a taking[2] and used that as a pretext for riding roughshod over private property rights. (See *Grupe,* 166 Cal App 3d at 174.)

California has allowed its concern for the general welfare to swallow the Fifth Amendment's prohibition against confiscation. (Compare *Kaiser Aetna v. U.S.* [1979] 444 US 164, 177; *Pennsylvania Coal Co. v. Mahon* [1922] 260 US 393, 415-416.) This Court's attention is needed to reassert the primacy of the Constitution.

THE GOVERNMENT MAY NOT UNREASONABLY CONDITION THE EXERCISE OF CONSTITUTIONAL RIGHTS

While this Court has been quite active in the land use field recently, it has not yet dealt with any case questioning the ability of a state or local government agency to attach conditions to the issuance of land use permits.

The issue is important, has produced varying responses from state courts (all purporting to interpret the same constitutional guarantee against confiscation of property), and will likely continue to grow in significance as financially hard-pressed government agencies continue their efforts to obtain something for nothing

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[2]See, *Ruckelshaus v. Monsanto Co.* (1984) ___ US ___, ___, 81 L Ed 2d 815, 834; *Kaiser Aetna v. U.S.* (1979) 444 US 164, 175; *Penn Central Transp. Co. v. City of New York* (1978) 438 US 104, 124.

by conditioning the grant of permits on the "donation" or "dedication" of property.[3]

However, this Court is no stranger to governmental attempts to condition the receipt of some governmental benefit on the surrender of a constitutional right. In *Perry v. Sindermann* (1972) 408 US 593, 597, this Court held—in no uncertain terms—that the government could not circumvent the constitution in that fashion:

> "For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests* . . . For if the government could deny a benefit to a person because of his constitutionally protected [rights], *his exercise of those freedoms would in effect be penalized and inhibited.* This would allow the government to 'produce a result which [it] could not command directly.' [Citation.] Such interference with constitutional rights is impermissible."

Building on this Court's decision in *Perry,* the Ninth Circuit Court of Appeals recently applied it in the context

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[3]This Court has, of course, reviewed issues involving the constitutionality of police power regulations in other contexts. See *Penn Central Transp. Co. v. City of New York* [1978] 438 US 104; *Kaiser Aetna v. U.S.* [1979] 444 US 164; *Agins v. City of Tiburon* [1980] 447 US 255; *San Diego Gas & Elec. Co. v. City of San Diego* [1981] 450 US 621; *Loretto v. Teleprompter Manhattan CATV Corp.* [1982] 458 US 419; *Williamson County Reg. Plan. Com. v. Hamilton Bank* [1985] ___ US ___.)

of conditions to land use permits. In *Parks v. Watson* (9th Cir 1983) 716 F 2d 646, a property owner sought to have a city vacate "paper" streets[4] so an apartment complex could be constructed. The city was amenable, but conditioned the vacation of the non-existent streets on the property owner's giving to the city property which contained valuable geothermal wells. The Court lost little time concluding that the city's desire to own the wells did not give it the right to extort their dedication because of the serendipitous appearance of their owner seeking a permit to undertake activity unrelated to geothermal wells:

> "Both case authority and scholarly commentary indicate that a condition requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred." (*Parks,* 716 F 2d at 652)

> "Since the requirement that Klamath Valley Company give its geothermal wells to the City had no rational relationship to any public purpose related to the vacation of the platted street, the unrelated purpose does not support the requirement that the company surrender its property without just compensation. . . . The condition violates the fifth amendment." (*Parks,* 716 F 2d at 653)

Extensive discussion of the law in other states is not appropriate in this jurisdictional statement. Suffice it to note that the state court decisions run the gamut from California, in which exactions may be imposed without regard to the impact of the proposed devel-

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[4]I.e., streets which appeared on the City's general plan for future construction but which did not yet exist as traveled ways.

opment to Illinois, Rhode Island, Florida, Montana, and Ohio, where exactions are permitted *only* if the applicant for a permit will create a burden on society specifically and uniquely attributable to his project. (*Pioneer Trust & Sav. Bank v. Village of Mount Prospect* [Ill 1961] 176 NE 2d 799, 802; *Frank Ansuini, Inc. v. City of Cranston* [RI 1970] 264 A 2d 910; *Admiral Dev. Corp. v. City of Maitland* [Fla App 1972] 267 So 2d 860; *Billings Properties, Inc. v. Yellowstone County* [Mont 1964] 394 P 2d 182; *McKain v. City Plan. Com.* [Ohio App 1971] 270 NE 2d 470.)

Wisconsin, New York, Connecticut, and Utah permit exactions if the proposed project will result in the municipality having to provide additional services. (*Jordan v. Village of Menomonee Falls* [Wis 1965] 137 NW 2d 442, 447; *Jenad, Inc. v. Village of Scarsdale* [NY 1966] 218 NE 2d 673; *Aunt Hack Ridge Estates, Inc. v. Planning Comm.* [Conn 1970] 273 A 2d 880; *Call v. City of West Jordan* [Utah 1980] 614 P 2d 1257.)

More recently, the rule generally being applied in other states is that the condition or exaction is valid *if* it is rationally related to the applicant's proposed action. (*Collis v. City of Bloomington* [Minn 1976] 246 NW 2d 19; *J.E.D. Associates v. Town of Atkinson* [NH 1981] 432 A 2d 12; *Call v. City of West Jordan* [Utah 1980] 614 P 2d 1257; *Land/Vest Properties, Inc. v. Town of Plainfield* [NH 1977] 379 A 2d 200; *Longridge Builders, Inc. v. Planning Bd.* [NJ 1968] 245 A 2d 336; see *Briar West, Inc. v. City of Lincoln* [Neb 1980] 291 NW 2d 730.)

Moreover, the question of whether such exactions may be required in *cash* rather than land is, in the words of a prominent commentator:

> ". . . one of the few important questions in the whole field of planning law which is as yet unsettled, with the states clearly split down the middle." (5 Williams, *American Land Planning Law* [1985] §156.08 at 360)

The bedrock federal constitutional precept is that the government may not condition the grant of any benefit on the surrender of a constitutional right. The enforcement of that precept should not depend on whether one lives in Illinois or California.

CALIFORNIA'S RULE RELEGATES THE PROTECTION OF FEDERAL CONSTITUTIONAL RIGHTS TO THE WHIM OF STATE AND LOCAL LEGISLATORS

Plainly, there must be some limit on the ability of government agencies to impose conditions on the issuance of permits. Otherwise, no citizen's rights would be secure. (See *Perry v. Sindermann* [1972] 408 US 593, 597, listing numerous decisions of this Court which invalidated conditions placed on obtaining some governmental benefit, even those denominated mere privileges rather than rights.) If there were no restrictions on government, the grant of *every* application or request could be conditioned on the payment of money on the assertion that the government would benefit if it had more money.

In the land use field, the constitutional line drawn by the courts is variously described as "rational relationship" or "nexus." (*Parks,* 716 F 2d at 652) When there is no nexus, or rational relationship, between the condition imposed and either the harm caused, or the benefit received, by the proposed development, the condition is void.

The only analysis of the nexus in the Court of Appeal's opinion is this speculation:

> "Petitioner's proposed improvement may constitute only a small impediment to public access, but when viewed as a part of the entire subdivision as it develops in the future the proposed improvement *may well be* a link in a chain barring access or making access more difficult and costly." (App. A, pp A-8—A-9; emphasis added.)

With all respect due, what kind of analysis is that? If that is the standard, the Legislature has just been given permission to run amok. So have cities, counties, and mosquito abatement districts.

Building on the earlier California opinion in *Georgia-Pacific Corp. v. California Coastal Com.* (1982) 132 Cal App 3d 678, the Court below concluded:

> "A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and the validity of a dedication requirement is *not dependent on a factual showing that the development has created the need for it."* (App. A, p A-6; quoting with approval; emphasis added.)

The constitutional rights of citizens cannot be left to the whim of state and local legislators. As this Court put it in *Owen v. City of Independence* (1980) 445 US 622, 649:

> ". . . a municipality has no discretion to violate the Federal Constitution; its dictates are absolute and imperative."

Yet the California rule does precisely what this Court, in *Owens,* forbade: it purports to grant state and local regulators the power to ignore the Fifth Amendment's prohibition against confiscation of private property for public use.

At a minimum, there must be some nexus in fact between the condition sought to be imposed and the use sought by the property owner. In effect, they are quid pro quo. But when the permit applicant must give quid without receiving quo, his rights have been violated.

The Court of Appeal's single sentence of off-hand speculation (quoted above) mentions no facts.[5] It speculates in a way no trial judge could permit a witness to do.

The asserted facts cannot justify the conclusion.

The real facts are that each of the 135 Hollister Ranch parcels is more than 100 acres. Each is restricted by the County to a single residence. Thus, construction of homes on *all* the lots would only place 135 homes on 14,000 acres. How will that interfere with access to the coast? Plenty of room will remain to build all the access roads anyone could imagine.

The only "impediment" to access after construction is the same one which already exists: the land is privately owned. But this Court long ago concluded that *that* "impediment" can only be removed by the constitutional means of *buying* access:

> "The rights of the public in a street purchased or laid out by eminent domain are those that

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[5]The only facts mentioned *anywhere* in the opinion are to the effect that *other* developments at *other* times and *other* places have caused access problems. (App. A, p A-8) That is no justification for forcing the Remmengas to pay $5,000.

> it has paid for. If in any case its representatives have been so shortsighted as to acquire only surface rights, without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place, and refusing to pay for it because the public wanted it very much. *The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.* A similar assumption is made in the decisions upon the 14th Amendment. [Citation.] When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
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> * * *
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> "We are in danger of forgetting that strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal Co. v. Mahon* [1922] 260 US 393, 415-416; emphasis added.)

If the California rule is allowed to stand, it will remove any restraint on government agencies coercing money from property owners. Based on the facts stated in the opinion, and the lip service paid to the need for nexus, *any* exaction will be sustainable. If *this* is nexus, anything is.

THE CONSTITUTION PROHIBITS MEETING EVEN LEGITIMATE GOVERNMENTAL OBJECTIVES BY VIOLATING THE RIGHTS OF INDIVIDUAL CITIZENS

The Court of Appeal suggests that the Legislature has recognized a problem, accepted the duty to solve it, and devised a solution.

But the opinion proceeds as though recognition of a legitimate governmental goal legitimizes whatever solution is chosen.

That is not the law. Determination of a legitimate governmental objective is the first step, not the last. The means chosen to achieve the objective are then subjected to constitutional scrutiny.

For example, in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, this Court was faced with a statute designed to facilitate communication via cable TV. The state required landlords to permit the installation of cables and announced that $1 was normally just compensation for any taking effected by this action. The City of New York urged, and the state courts agreed, that the objective was a legitimate police power activity and thus beyond constitutional challenge.

This Court reversed, concluding that recognition of a valid police power objective was only half the case. The other half of the case dealt with the means chosen to attain it:

> "The Court of Appeals determined that §828 serves the legitimate public purpose of 'rapid development of and maximum penetration by a means of communication which has important educational and community aspects,' [citation], and thus is within the State's police

> power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.* [Citations.]" (*Loretto,* 458 US at 425; emphasis added.)

To the same effect is *U.S. v. Security Industrial Park* (1982) 459 US 70, 75.

In *Loretto,* this Court concluded that the valid exercise of the police power to solve a legitimate governmental problem required compensation to property owners whose rights would be affected.

The same is true here. That it may be a perfectly valid goal of the California legislature to increase coastal access for the general public is not the only question involved. The Legislature is not writing on a clean slate, free to create a new world in its image, free of any constraints. The slate contains much writing on it already. Among the things written are that property may be privately owned and is constitutionally protected. As this Court held in *Hawaii Housing Auth. v. Midkiff* (1984) ____ US ____, 81 L Ed 2d 186, states are free to engage in land reform, but when private property is taken in the process for use by others, compensation is mandatory. It is that provision that differentiates land reform in the United States from that practiced elsewhere in the world.

This Court also held in *Loretto* that it was no answer to say that landlords could avoid the conditions by not renting their property:

> "It is true that the landlord could avoid the requirements of §828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on

> his forfeiting the right to compensation for a physical occupation." (*Loretto,* 458 US at 439, fn 17)

The same analysis would seem *a fortiori* true of a property owner's ability to build a modest, 1900 square foot, home on his 106-acre parcel of vacant land. His right to make use of his property cannot be conditioned on payment of tribute.[6]

There are thus two questions which must be addressed in this type of case:

- Is the governmental objective within the ambit of the police power?
- If so, does the proposed solution violate the constitutional rights of some citizens?

No challenge is raised to the first issue. The Remmengas can concede that the general goal of providing coastal access is laudable. To legally achieve that goal by exaction, however, there must be a rational relationship between the applicant's action and the government's exaction for the regulation to satisfy the constitution.

Regardless of the propriety of the governmental goal, the route to its solution must conform to the constitution, not circumvent it. As this Court put it in *Watson v. Memphis* (1963) 373 US 526, 537:

> "[V]indication of conceded constitutional rights cannot be made dependent upon any

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[6]Some courts have not been as restrained as the author of this brief. The New Hampshire Supreme Court called the practice "extortion" (*J.E.D. Associates, Inc. v. Town of Atkinson* [NH 1981] 431 A 2d 12, 14), while the Minnesota Supreme Court called it "grand theft" (*Collis v. City of Bloomington* [Minn 1976] 246 NW 2d 19, 26).

theory that it is less expensive to deny than to afford them."

THE LEGISLATURE'S DISPARATE TREATMENT OF HOLLISTER RANCH AND SEA RANCH OFFENDS THE EQUAL PROTECTION GUARANTEE

If the equal protection guarantee has any meaning, it is that those who are similarly situated should receive similar treatment under the law. As this Court recently put it:

> "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." (*City of Cleburne v. Cleburne Living Centers, Inc.* [1985] ____ US ____, ____)

When an exaction is imposed on a property owner without a rational nexus, it is seen by this court as an invalid taking by taxation rather than a valid exercise of the police power:

> ". . . the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation." (*Norwood v. Baker* [1898] 172 US 269, 279)

When such taxation is imposed on a particular group but not on others, and there is no rational basis for that distinction, that group is denied equal protection of the laws.

Here, the Legislature was concerned with acquiring access to the coast at two multi-thousand-acre subdivisions, Hollister Ranch and Sea Ranch.

The method chosen was to *pay to* Sea Ranch owners $500,000 (Pub Res Code §30610.6[c]), while obtaining *payment from* Hollister Ranch owners of $500,000.[7] (Pub Res Code §30610.8[b])[8]

The Court of Appeal says this disparate treatment is constitutional.

It cannot be.

Two things bear note.

First, people who are similarly situated cannot be dissimilarly treated. If the Sea Ranch solution of *buying* access is correct (as the Remmengas believe), there is no justification for buying it from Sea Ranch owners while extorting it from Hollister Ranch owners. [9]

Second, both solutions cannot be right. If the State is correct (as it says at bench) that it can lawfully extract *dedication* of access (or money "in lieu" thereof) from owners of lots in coastal subdivisions, then it cannot validly pay the Sea Ranch owners to acquire such rights.[10]

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[7]As there are 100 Hollister Ranch parcels not yet built upon, the total expected, at $5,000 per parcel, is $500,000.

[8]Does it strike anyone as a coincidence that the payment *to* Sea Ranch owners is equal to the payment anticipated *from* Hollister Ranch owners?

[9]The State's intent to use the "in lieu" condition to pressure Hollister Ranch owners may be seen from the Commission's non-acceptance of the Remmengas' offer to deposit the $5,000 in court (or post a bond in that amount) during this litigation while they constructed their home. Plainly, the Commission preferred to hold construction of the Remmengas' home hostage.

[10]Obviously, the Remmengas do not believe the State's position is valid. But if it is, the disparate treatment cannot be.

The scheme is an affront to the equal protection guarantee. It is invalid.

DEFERENCE TO THE LEGISLATURE DOES NOT REQUIRE A JUDICIAL RUBBER STAMP

In two different contexts, the Court of Appeal abdicated the judicial responsibility to review legislation to determine its constitutionality.

First. In upholding the "in lieu" exaction, the Court of Appeal invoked the rule that statutes are to be upheld if facts exist to support the legislative determination. (App. A, pp A-7—A-8)

The Remmengas have no quarrel with the general rule.

As applied at bench, however, the rule has been stretched to such proportions that it validates *any* legislative action.

The cases cited by the Court of Appeal do not even suggest (much less require) such judicial abdication. Note is requested that in each case, the particular regulation was upheld because of facts *directly related* to the regulation:

CASE	REGULATION	JUSTIFICATION
Williamson v. Lee Optical (1954) 348 US 483	prohibition of opticians fitting glasses	to ensure that all glasses are properly designed to rectify problem
Ferguson v. Skrupa (1963) 372 US 726	prohibition of debt adjusting by non-lawyers	protection of public from unprofessional acts

CASE	REGULATION	JUSTIFICATION
Rees v. Dept of Real Estate (1977) 76 CA 3d 286	requirement of real estate license	protection of public from unprofessional acts
Varanelli v. Structural Pest Control Bd. (1969) 1 CA 3d 217	requirement of pest control license	protection of public from unprofessional acts
Doyle v. Board of Barber Examiners (1963) 219 CA 2d 504	limit on number of apprentices	protection of public from untrained or improperly supervised barbers
People v. Aguiar (1968) 257 CA 2d 597	criminal penalty for marijuana possession	protection of public from adverse affects of drug
Candlestick Properties, Inc. v. San Francisco Bay etc. Com. (1970) 11 CA 3d 557	establishment of San Francisco Bay Conservation and Development Comm'n	protection of public from harm of haphazard development

In *each* case, the justification fit the specific restriction established by the statute.

Here, by contrast, the regulation is quite specific, i.e., Hollister Ranch owners must pay $5,000 as a condition to building a home. Yet the justification presented by the court below is broad enough to justify virtually anything, i.e., that at other times and other places along

California's 1,000 mile coast there have been access problems. (App. A, p A-8) No attempt is made in the opinion to show any possible impact on access by construction of the Remmengas' home (or even a home on *every* Hollister Ranch parcel).

The opinion abdicated the Court of Appeal's responsibility to determine whether specific legislation has any specific rational basis. It permitted confiscation of property for any rationalization the Legislature desired to put forth.

Nor does the examination urged by the Remmengas' involve the courts in second-guessing legislative decisions. As this Court explained in *Owen v. City of Independence* (1980) 445 US 622, 649-650:

> ". . . a municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a §1983 action, it does not seek to second-guess the 'reasonableness' of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. As was stated in Sterling v. Constantin, 287 US 378, 398, 77 L Ed 375, 53 S Ct 190 (1932): 'When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.' "

Second. In the equal protection discussion (App. A, p A-10), the Court of Appeal uncritically accepted the Legislature's assertion that *payment* of $500,000 by the State *to* the Sea Ranch owners is the *same* as *receipt* of $500,000 by the State *from* the Hollister Ranch owners.

Whatever the Court of Appeal may think of the practical wisdom of buying off the litigious Sea Ranch owners (see App. A, p A-10), the net result is that the Legislature said "black is white" and the Court of Appeal didn't even blink when swallowing that absurdity.

No amount of argument can change the facts:

- the State is paying money *to* owners at Sea Ranch, while
- the State is extorting money *from* owners at Hollister Ranch.

More seems needed than bland recitation of the Legislature's absurd rationalization that they are the same.

Such ipse dixit legislative wordplay cannot substitute for constitutional analysis.

The Legislature—because it is the Legislature—has the power to pass laws which are whimsical, or even downright foolish. But there are limits to such foolishness. The Legislature cannot decree that the tides shall stop, or that the sun shall rise in the west, or that the *payment* of half a million dollars is "equivalent" to the *receipt* of half a million dollars.

The statutory scheme is a blatant affront to the equal protection guarantee.

CONCLUSION

The opinion of the Court of Appeal is a sad chapter in American Constitutional law. It shows a part of the judiciary as no more than a legislative rubber stamp.

If a government agency can demand $5,000 as a "coastal access" requirement from a person whose property is more than a mile from the coast and causes no interference with coastal access, where is the line drawn? The Court of Appeal offers no clue with respect to time, place, manner, amount, geographic proximity, or actual effect. *Any* application for a permit to use property could have *any* monetary charge set as a precondition.

If conditions are to be valid, they must contain a rational nexus. There must be a quid pro quo. The Remmengas are being required to give the quid, but are offered no quo. That is bad law and worse policy. It strikes fatally at a philosophical basis of our nation.

If the constitution is to still stand as the individual's protection against overreaching government agencies, Mr. and Mrs. Remmenga pray that probable jurisdiction be noted.

Respectfully submitted,

JERROLD A. FADEM
MICHAEL M. BERGER

FADEM, BERGER & NORTON

Attorneys for Appellants

APPENDIX

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

ALVIN J. REMMENGA AND SYLVIA REMMENGA, Petitioners and Appellants, v. CALIFORNIA COASTAL COMMISSION Respondent and Real Party in Interest	2d Civil No. B004110 (Super. Ct. No. 141959) (Santa Barbara County)

COURT OF APPEAL - SECOND DIST.
FILED
JAN 14 1985
CLAY R. ..., JR. Clerk
Deputy Clerk

This case raises questions concerning the constitutionality of sections 30610.3 and 30610.8 of the Public Resources Code. Appellants sought a writ of mandate from the trial court to compel the California Coastal Commission to issue a development permit without payment of the $5,000 fee required by section 30610.8. They appeal from the trial court's denial of their petition. We find the statutes compatible with the state and federal Constitutions and affirm.

FACTS

The Hollister Ranch subdivision comprises approximately 14,000 acres of land in Santa Barbara County, fronting on the Pacific Ocean for about 8 1/2 miles. It contains 135 lots, averaging more than 100 acres each

in size. Within the subdivision there are no public roads and public access to the area from public roads is barred by armed guards. Visits to the adjoining beach by the general public have been limited to persons arriving by boat or walking below the high tide line from Gaviota State Beach at the realatively few times of the year when tides permit.

Petitioners acquired their 106 acre lot in 1977. It is located more than a mile from the coast. Each lot owner has a non-exclusive easement to use the ranch common areas, which include the private roads leading to the coast. These common areas remain in the ownership of the subdivider, but will revert to a homeowners' association when all of the lots are sold.

In 1978 petitioners filed an application with the commission for permission to construct a single family residence. Permission was granted subject to a condition that public access to the coast be provided. The Los Angeles County Superior Court issued a writ of mandate requiring the commission to set aside the decision and reconsider its action. At this point the Legislature adopted an urgency measure, effective February 17, 1982, adding section 30610.8 to the Public Resources Code. It reads in part as follows: "(a) The Legislature hereby finds and declares that a dispute exists at the Hollister Ranch in Santa Barbara County with respect to the implementation of public access policies of this division and that it is in the interest of the state and the property owners at the Hollister Ranch to resolve this dispute in an expeditious manner. The Legislature further finds and declares that public access should be provided in a timely manner and that in order to achieve this goal, while permitting property owners to commence construction, the provisions of this section are necessary to promote the public's welfare. (b) For purposes of

section 30610.3[1] and with respect to the Hollister Ranch public access program, the in-lieu fee shall be five thousand dollars ($5,000) for each permit. Upon payment by the applicant for a coastal development permit of this in-lieu fee to the State Coastal Conservancy for use in implementing the public access program, the applicant may immediately commence construction if the other conditions of the coastal development permit, if any, have been met. No condition may be added to a coastal development permit that was issued prior to the effective date of this section for any development at the Hollister Ranch."

DISCUSSION

I

One issue for decision is whether this statute, as applied to appellants, exacts an unconstitutional condition for receipt of a permit—the payment of money in lieu of dedication of a right of way to the coast. Petitioners contend that it does because it requires payment of money in lieu of dedication of private property without payment of just compensation. Respondent replies that the Legislature had a rational and valid basis for requiring payment of the fee to secure a development permit.

If as a condition to receipt of a permit, the applicant must donate property for a public use that bears no relationship to the benefit conferred on the applicant or the burden imposed on the public, there is a taking of property without payment of just compensation in violation of the United States Constitution. (*Loretto v.*

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[1]Section 30.610.3 provides for fees in lieu of dedication of right of way to the beach. The fees are based upon a fair share of the estimated cost of acquiring the right of way, determined by independent appraisers.

Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419.) This is the basis for California court decisions invalidating such conditions, e.g., *Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d 412; *Liberty v. California Coastal Comm.* (1980) 113 Cal.App.3d 491. *Scrutton* held invalid a requirement for dedication and improvement of public streets as a condition for rezoning from agricultural to multi-family dwelling use. *Liberty* disapproved a requirement by the Coastal Commission, that as a condition for receipt of a permit to construct a restaurant, the developer must permit the restaurant parking lot to be used by the general public until 5 p.m. for a period of 30 years.

Conversely, if there is such a rational relationship, the requirement of dedication of property or payment of money in lieu thereof is a validly imposed condition. *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31; *Associated Homebuilders, etc., Inc. v. Walnut Creek* (1971) 4 Cal.3d 633. In *Ayres* the court upheld a requirement by the City of Los Angeles for dedication by the subdivider of a 10 foot wide strip along the proposed subdivision for the purpose of widening the adjoining street as a condition for the receipt of subdivision map approval. The subdivision would increase traffic on the street and widening would benefit not only the general public, but also the subdivision lot owners.

Walnut Creek, supra, involved a requirement for dedication of land or, in lieu thereof, the payment of money, for development of a park for recreational purposes, as a condition for approval of a subdivision map. This was found to be permitted constitutionally. The subdivision would increase the need for parks.

The parties to this litigation have no quarrel with the general rules stated above. Their disagreement is whether on the facts here presented there is a sufficient nexus or relationship between the improvement for which a permit is sought and the condition imposed.[2]

It is firmly established that the justification for required dedication is not limited to the needs of or burdens created by the project. *(Ayres v. City Council of Los Angeles, supra; Associated Home Builders, etc., Inc. v. Walnut Creek, supra.)* "We see no persuasive reason in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required." (*Associated Homebuilders, etc. Inc., v. Walnut Creek, supra,* at pp. 639-640.) In that case, the court found that a constitutionally sufficient nexus or relationship between a project and a dedication requirement had been established on the basis of a "general need for recreational facilities caused by present and future subdivisions." (*Ibid.* at p. 638.) It follows that even if an individual project does not create an immediate need for a compensating accessway, one may be required of it if its effect together with the

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[2]In approaching this issue it must be kept in mind that the determination does not depend upon findings of the Coastal Commission or evidence presented at the hearings before the Commission or at the Superior Court trial. The California Legislature found that the $5,000 fee requirement was necessary to promote the public welfare. It is this finding that presents the issue.

cumulative impact of similar projects would in the future create or increase the need for a system of such compensating accessways.

Viewing the problem as a whole, it appears that the requirement to pay an in lieu fee of $5,000 for development of one lot presents essentially the same constitutional issue as would be presented by a requirement that the owner of unimproved property adjoining tidelands dedicate a public right of way in order to obtain a development permit. As to whether this is constitutionally permitted is the basic issue in this case.

Relying upon *Associated home Builders,* the court in *Georgia-Pacific Corp. v. California Coastal Com.* (1982) 132 Cal.App.3d 678, 699, in dealing with the public access requirements of section 30212[3] of the Act, specifically stated that: "A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and the validity of a dedication requirement is not dependent on a factual showing that the development has created the need for it. (Citations.) The 'scope and extent' of the easements required by the Commission were 'reasonably related' to one of the principal objectives of the Coastal Act, which is to provide for maximum access to the coast by all the people in this State. (See §30001.5, subd. (c).) Their relationship to the 'nature and impact' of the proposed projects was not a valid basis for the court's determination that the access conditions deprived Georgia-Pacific of its constitutional rights."

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[3]Requiring dedication of public access as a condition of approval of new development projects.

In reviewing the action of the Legislature, we are bound by the rule stated in *Candlestick Properties, Inc. v. San Francisco Bay Conservation, etc., Com.* (1970) 11 Cal.App.3d 557, 571: "It is a well settled rule that determination of the necessity and form of regulations enacted pursuant to the police power 'is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity?' (*Consolidated Rock Products Co. v. City of Los Angeles,* 57 cal.2d 515, 522.) Furthermore, even if the reasonableness of the regulation is fairly debatable, the legislative determination will not be disturbed. (*Hamer v. Town of Ross* 59 Cal.2d 776, 783, and cases cited therein.)" (See also *People v. Aguiar* (1968) 257 Cal.App.2d 597, 603.) This rule follows the reasoning of a line of cases emanating from the United States Supreme Court decisions in *Williamson v. Lee Optical of Okla.* (1954) 348 U.S. 483, 488, and *Ferguson v. Skrupa* (1962) 372 U.S. 726. In Ferguson the court said that under the due process clause: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." (*Ferguson v. Skrupa, supra,* 372 U.S. 726, 730.) Judicial examination of the basis upon which the Legislature may rationally have concluded a threat to the public interest existed is complete when any fact or set of facts appear or may be hypothesized to support this legislative conclusion. (*Rees v. Department of Real Estate, supra,* 76 Cal.App.3d 286, 300; *Varanelli v. Structural Pest Control Board* (1969) 1 Cal.App.3d 217,

220; *Doyle v. Board of Barber Examiners* (1963) 219 Cal.App.2d 504.)

In the present case, the Legislature had ample basis upon which to conclude that construction of the proposed improvement between the first public road and the coast, in combination with improvement of other lots in that area, would have a cumulative adverse impact on the public's constitutional right of access. Government studies have demonstrated that hundreds of miles of publicly owned tidelands have been walled off from public access by private development. *Comprehensive Ocean Area Plan and Supplement* (1971); California Department of Fish and Game, *Fish and Wildlife in the Marine and Coastal Zone* (1971) California Department of Conservation, Division of Mines and Geology, *Non-Living Resources of the Coastal Zone* (1971); California Department of Parks and Recreation, *California Coastline preservation and Recreation Plan* (1971); *CEEED, supra,* at pp. 321-322.)

The importance of public access is recognized in the California Constitution, Article X, Section 4, which states: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Petitioner's proposed improvement may constitute only a small impediment to public access, but when

viewed as a part of the entire subdivision as it develops in the future the proposed improvement may well be a link in a chain barring access or making access more difficult and costly.

If the Hollister Ranch had not previously been subdivided and were now applying for subdivision approval, public access to the shore could constitutionally have been required. (*Georgia-Pacific Corp. v. California Coastal Com.* (1982) 132 Cal.App.3d 678; see *Frisco Land and Mining Co., v. State of California* (1977) 74 Cal.App.3d 736, 753, 754.) The fact that the ownership has been divided into 135 lots should not foreclose the access requirement as a condition of development. Each lot owner may be required, not to provide total access, but to participate in providing it. This is the plan devised and mandated by the Legislature.

II

A second issue for decision is whether the imposition of in-lieu fees by section 30610.8 is a denial of the equal protection of the laws as guaranteed by state and federal constitutions. Appellants argue that such a denial occurs because section 30610.6 authorizes purchase of public access rights at Sea Ranch, a subdivision in Sonoma County.

In determining whether land use regulations comply with the equal protection clause the test is whether there is a rational classification. (*Norsco Enterprises v. City of Fremont* (1976) 54 Cal.App.3d 488.) A careful review of the background and statute indicates that section 30610.6 was basically designed to settle claims. As stated in appellant's closing brief, "[T]he Sea Ranch litigation had already raged like wildfire across every possible

court, . . ."[4] Both Sea Ranch and Hollister Ranch owners were obligated to provide public access to the shore in mitigation of the ultimate impacts of their development proposals. The difference in treatment by the Legislature results from the difference in action by the owners. In the case of Sea Ranch, the landowners association agreed to settle all its disputes with the state, including a dispute over the return of environmental deposits which had previously been paid. (see §30610.6(a)(4)), and to provide access to the public. In turn, the state, realizing that it would save millions of dollars in court costs and administrative time by not further litigating the issues on a permit by permit basis, and that it would actually realize public access to the sea far sooner with this settlement, agreed to settle all disputes with Sea Ranch by payment to them of $500,000 and receipt of all access easements and deed restrictions.

In contrast no agreement has been reached between the Hollister Ranch Association and the state settling the public access problem. The Legislature, in enacting section 30610.6(m), specifically found that: [T]hat the *provisions for the settlement of this dispute,* especially with respect to public access, as set forth in this section provide an alternative *to and are equivalent to the provisions set forth in Section 30610.3.* The Legislature further finds that the provisions of this section are not in lieu of the permit and planning requirements of this division but rather provide for an alternative mechanism to Section 30610.3 for the resolution of outstanding

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[4]*Sea Ranch Assn. v. Cal. Coastal Com.* (N.D. Cal. 1975) 396 F.Supp. 533; remanded (9th Cir. 1976) 537 F./2d 1058; re-decided (N.D. Cal. 1981) 527 F.Supp. 390; vacated (1981) 454 U.S. 1070; *Oceanic Cal., Inc. v. North Central Coast Reg. Com.* (1976) 63 Cal.App.3d 57, Cert. den. (1977) 431 U.S. 951.

issues at the Sea Ranch." (Emphasis added.) It also made the findings set forth in the footnote below.[4]

In short, section 30610.6 was an elaboration of section 30610.3. As does section 30610.3, it provided for a comprehensive system of lateral and vertical accessways

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[4](a) The Legislature hereby finds and declares that it is in the public interest to provide by statute for the resolution of the lengthy and bitter dispute involving development of existing legal lots within the unincorporated area of Sonoma County, commonly known as Sea Ranch. The reasons for the need to finally resolve this dispute include:

1. Acknowledgement by the responsible regulatory agencies that development of existing lots at Sea Ranch can proceed consistent with the provisions of this division and other applicable laws provided certain conditions have been met. Development has been prevented at considerable costs to property owners because these conditions have not been met.

2. That it has been, and continues to be costly to Sea Ranch property owners and the public because of, among other reasons, extensive and protracted litigation, continuing administrative proceedings, and escalating construction costs.

3. The need to provide additional public access to and along portions of the coast at the Sea Ranch in order to meet the requirement of this division. The continuation of this dispute prevents the public from enjoying the use of such access opportunities.

4. The commission is unable to refund 118 "environmental deposits" to property owners because coastal development permit conditions have not been met.

5. It appears likely that this lengthy dispute will continue unless the Legislature provides a solution, and the failure to resolve the dispute will be unfair to property owners and the public.

(b) The Legislature further finds and declares that because of the unique circumstances of this situation, the provisions of this section constitute the most expeditious and equitable mechanism to ensure a timely solution that is in the best interest of property owners and that it is consistent with the requirements of this division.

to and along the shore, returned monies previously paid by ranch owners and provided a means of obtaining access immediately, instead of on a piece-meal bases. The Legislature does not run afoul of the equal protection clause when faced with two parties challenging the same requirements, it agrees to settle the litigation with one party and continues the [sic] litigate with another who has refused to agree to the same or a similar compromise.

The decision below is affirmed. The trial court should issue the writ of mandate.

CERTIFIED FOR PUBLICATION.

*WILLARD, J.**

We concur:

STONE, P.J.

ABBE, J.

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* Assigned by the Chairperson of the Judicial Council.

Ronald C. Stevens, Judge

Superior Court County of Santa Barbara

Fadem, Berger & Norton for Petitioners and Appellants.

John K. Van De Kamp, Attorney General, N. Gregory Taylor and Peter H. Kaufman, Deputy Attorneys General, for Respondent and Real Party in Interest.

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

ALVIN J. REMMENGA AND SYLVIA REMMENGA, Petitioners and Appellants, v. CALIFORNIA COASTAL COMMISSION Respondent and Real Party in Interest	2d Civil No. B004110 (Super. Ct. No. 141959) (Santa Barbara County) ORDER MODIFYING OPINION

COURT OF APPEAL - SECOND DIST.
F I L E D
JAN 17 1985
CLAY ROBBINS, JR. Clerk
Deputy Clerk

THE COURT:

It is ordered that the opinion filed herein on January 14, 1985, be modified in the following particulars:

On page 17 the last paragraph should read as follows:

The decision below is affirmed.

CERTIFIED FOR PUBLICATION.

APPENDIX B

CLERK
COURT OF APPEAL
SECOND APPELLATE DISTRICT
1280 SO. VICTORIA AVE.
VENTURA, CA 93003

FEB 1 3 1995

B004110

Berger and Norton Fadem
501 Santa Monica Blvd
Santa Monica, CA 90406

B004110
Remmenga, Alvin & Sylvia
vs.
California Coastal Commission

PETITION FOR REHEARING DENIED

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

JAF
MB

APR 25 1985

I have this day filed Order HEARING DENIED

Mosk, Lucas JJ. OF THE OPINION THAT THE PETITION SHOULD BE GRANTED.

In re: *No.* B004110

ALVIN J. REMMENGA ETC.

vs.

CALIF. COASTAL COMMISSION

Respectfully,

Clerk

84 32962

APPENDIX D

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F-12

FILED
SUPERIOR COURT
NOV 18 1982
HOWARD C. MENZEL, County Clerk-Recorder
By Andrea Castaneda
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

ALVIN J. REMMENGA and SYLVIA REMMENGA, Petitioners, v. CALIFORNIA COASTAL COMMISSION, Respondent Real Party in Interest.	NO. 141959 JUDGMENT DENYING PEREMPTORY WRIT OF MANDAMUS

This matter came regularly before this Court on October 28, 1982. Thomas M. Dankert appeared as attorney for petitioners and Peter H. Kaufman, Deputy

Attorney General, appeared as attorney for respondent. The Court having considered all memorandum of points and authorities filed by the parties; having reviewed and examined the administrative record of the proceedings before respondent Commission; and having heard oral argument by the parties,

IT IS ORDERED THAT:

1. The petition for a peremptory writ of mandate in this matter is hereby denied in that petitioners failed to establish that respondent Commission's action in conditionally approving their permit application (Appeal No. 101-79) on May 20, 1982, was in excess of its jurisdiction; an abuse of its discretion; or violative of any federal or state constitutional provisions or that sections 30610.8 and 30610.3 of the Public Resources Code are unconstitutional.

2. Respondent California Coastal Commission shall recover its costs of suit in this action in the sum of $_____

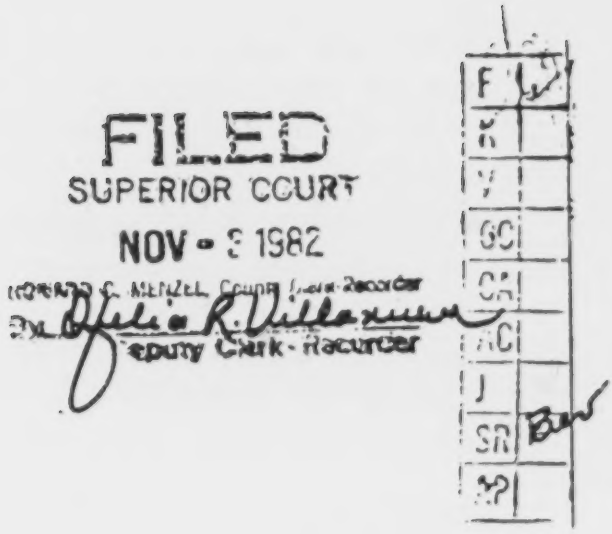
DATED: November 17, 1982.

JUDGE OF THE SUPERIOR COURT

Judgment entered on _____, 1982, in the Judgment Book, Volume No. ____, pp. ____.

Clerk _____

Deputy Clerk _____



SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

ALVIN J. REMMENGA and SYLVIA REMMENGA, Petitioners, vs. CALIFORNIA COASTAL COMMISSION, Respondent Real Party in Interest.	No. 141959 MEMORANDUM OF INTENDED DECISION

The petition for writ of mandate came on regularly for hearing on October 28, 1982. The court has considered petitioners' memorandum of points and authorities in support of the petition, respondent's answer and memorandum of points and authorities in support thereof. The court has also considered petitioners' supplemental memorandum of points and

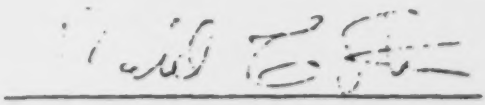
authorities and respondent's reply memorandum. In addition, the administrative record of the proceedings before the State Coastal Commission has also been considered.

The court finds that petitioners have failed to establish that the Commission's actions were in violation of federal or state constitutions; nor were the Commission's actions in excess of jurisdiction, nor did they constitute an abuse of discretion. The court also finds that Section 30610.8 of the Public Resources Code is constitutional.

The petition for writ of mandate should be denied.

Counsel for respondent shall prepare an appropriate order.

Dated: November 1, 1982



RONALD C. STEVENS
Judge of the Superior Court

FILED 7/18/85

IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT

STATE OF CALIFORNIA

ALVIN J. REMMENGA AND SYLVIA REMMENGA,

Appellants,

vs.

CALIFORNIA COASTAL COMMISSION,

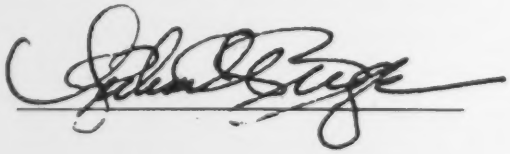
Respondent.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appellants Alvin J. Remmenga and Sylvia Remmenga hereby appeal to the Supreme Court of the United States from the decision of the California Court of Appeal entered in this action on January 14, 1985 and as to which the California Supreme Court denied hearing on April 25, 1985.

This appeal is taken pursuant to 28 USC §1257(2).

FADEM, BERGER & NORTON



MICHAEL M. BERGER
Attorneys for Appellants

APPENDIX G

PROOF OF SERVICE

STATE OF CALIFORNIA

ss.

COUNTY OF LOS ANGELES

I am a citizen of the United States and employed in the County aforesaid. I am over the age of 18 and not a party to the above entitled action; my business address is 501 Santa Monica Boulevard, Santa Monica, California 90401.

On July 17, 1985, I served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the interested parties in this action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Monica, California, addressed as follows:

John K. Van de Kamp,
Atty Gen
N. Gregory Taylor, Asst
Atty Gen
Peter H. Kaufman, Dep
Atty Gen
Tishman Building
3580 Wilshire Boulevard
Los Angeles, CA 90010

Clerk
California Supreme Court
4250 State Building
350 McAllister Street
San Francisco, CA 94102

Clerk
California Court of Appeal
Second Appellate District,
Division 6
1280 So. Victoria
Ventura, CA 93003

Clerk
Santa Barbara County
Superior Court
For the Hon. Ronald C.
Stevens
1100 Anacapa Street
Santa Barbara, CA 93101

I declare under penalty of perjury that the foregoing is true and correct.

Executed July 17, 1985, at Santa Monica, California.

Jacquelynn Tollefson

JACQUELYNN TOLLEFSON

STATUTORY PROVISIONS

The following statutes are in the California Public Resources Code:

§30610.3. Inadequate public access through subdivided area; adoption of access program; financing; in-lieu fees

(a) Whenever the commission determines (1) that public access opportunities through an existing subdivided area, which has less than 75 percent of the subdivided lots built upon, or an area proposed to be subdivided are not adequate to meet the public access requirements of this division and (2) that individual owners of vacant lots in such an area do not have the legal authority to comply with such public access requirements as a condition of securing a coastal development permit for the reason that some other person or persons has such legal authority, the commission shall implement such public access requirements as provided in this section.

(b) The commission, on its own motion or at the request of an affected property owner, shall identify an area as meeting the criteria specified in subdivision (a). After such an area has been identified, the commission shall, after appropriate public hearings adopt a specific public access program for such area and shall request that the State Coastal Conservancy, established pursuant to Division 21 (commencing with Section 31000), implement such program. Such access program shall include, but not be limited to, the identification of specific land areas and view corridors to be used for public access, any facilities or other development deemed appropriate, the commission's recommendations regarding the manner in which public access will be managed, and the types of permitted public uses. The

State Coastal Conservancy shall, pursuant to its authority, implement such public access program.

(c) There is, in the General Fund, the Coastal Access Account. The State Coastal Conservancy shall be authorized to expend funds when appropriated from the Coastal Access Account for the purchase of lands and view easements and to pay for any development needed to carry out the public access program specified in subdivision (a). Not more than 5 percent of the amount of funds necessary to carry out each such public access program may be provided as a grant to the State Coastal Conservancy for its administrative costs incurred in carrying out the access program.

(d) The State Coastal Conservancy may enter into any agreement it deems necessary and appropriate with any state or local public agency or with a private association authorized to perform such functions for the operation and maintenance of any access facilities acquired or developed pursuant to this section.

(e) Every person receiving a coastal development permit or a certificate of exemption for development on any vacant lot within an area designated pursuant to this section shall, prior to the commencement of construction, pay to the commission, for deposit in the Coastal Access Account, an "in-lieu" public access fee. The amount of each such fee shall be determined by dividing the cost of acquiring the specified lands and view easements by the total number of lots within the identified area. The proportion of the acquisition cost that can be allocated to lots built upon pursuant to permits that were not subject to public access conditions under this division or the California Coastal Zone Conservation Act of 1972 (former Division 18 (commencing with Section 27000)) shall be paid from the

Coastal Access Account. An "in-lieu" public access fee may be in the form of an appropriate dedication, in which event the lots to which such dedication can be credited shall not be counted toward the total number of lots used in arriving at the "in-lieu" public access fee share for each remaining lot.

(f) For purposes of determining the acquisition costs specified in subdivision (e), the State Coastal Conservancy may, in the absence of a fixed price agreed to by both the State Coastal Conservancy and the seller, specify an estimated cost based on a formal appraisal of the value of the interest proposed to be acquired. The appraisal shall be conducted by an independent appraiser under contract with the State Coastal Conservancy and shall be completed within 120 days of the adoption of the specific public access program by the commission pursuant to subdivsion (b). Such appraisal shall be deemed suitable for all purposes of the Property Acquisition Law (Part 11 (commencing with Section 15850 of the Government Code)). For every year following public acquisition of the interests in land specified as part of a public access program and prior to payment of the required "in-lieu" fee, a carrying cost factor equal to 5 percent of the share attributable to each lot shall be added to any unpaid "in-lieu" public access fee; provided, however, that a lot owner in such an area may pay the "in-lieu" public access fee at any time after public acquisition in order to avoid payment of the carrying cost factor.

(g) No provision of this section may be applied within any portion of the unincorporated area in the County of Sonoma, commonly known as the Sea Ranch.

§30610.4. Single family residence construction; designation of areas where coastal development permit not required

Upon establishment of an acquisition cost pursuant to subdivision (f) of Section 30610.3, the commission shall review the area in question to determine if all or some portion of such area meets the criteria specified in subdivision (b) of Section 30610.1 for areas within which no coastal development permit will be required from the regional commission or the commission for construction of single-family residences. Notwithstanding paragraph (1) of subdivision (c) of Section 30610.1, lots other than those immediately adjacent to any beach or to the mean high tide line where there is no beach can be included in such an exclusion area. If the commission determines an area designated pursuant to subdivision (b) of Section 30610.3 meets such criteria, the area shall be designated as one wherein no coastal development permit from the regional commission or the commission shall be required for the construction of single-family residences.

(b) Prior to the commencement of construction of any single-family residence within an area designated pursuant to this section, a certificate of exemption must be obtained pursuant to Section 30610.2 and the appropriate "in-lieu" public access fee shall be paid.

§30610.5. Urban land areas; exclusion from permits provisions; conditions

Urban land areas shall, pursuant to the provisions of this section, be excluded from the permit provisions of this chapter.

(a) Upon the request of a local government, an urban land area, as specifically identified by such local

government, shall, after public hearing, be excluded by the commission from the permit provisions of this chapter where both of the following conditions are met:

(1) The area to be excluded is either a residential area zoned and developed to a density of four or more dwelling units per acre on or before January 1, 1977, or a commercial or industrial area zoned and developed for such use on or before January 1, 1977.

(2) The commission finds both of the following:

(i) Locally permitted development will be infilling or replacement and will be in conformity with the scale, size, and character of the surrounding community.

(ii) There is no potential for significant adverse effects, either individually or cumulatively, on public access to the coast or on coastal resources from any locally permitted development; provided, however, that no area may be excluded unless more than 50 percent of the lots are built upon, to the same general density or intensity of use.

(b) Every exclusion granted under subdivision (a) of this section and subdivision (e) of Section 30610 shall be subject to terms and conditions to assure that no significant change in density, height, or nature of uses will occur without further proceedings under this division, and an order granting an exclusion under subdivision (e) of Section 30610, but not under subdivision (a) of this section may be revoked at any time by the commission, if the conditions of exclusion are violated. Tide and submerged land, beaches, and lots immediately adjacent to the inland extent of any beach, or of the mean high tide line of the sea where there is no beach, and all lands and waters subject to the public trust shall not be excluded under either

subdivision (a) of this section or subdivision (e) of Section 30610.

§30610.6. Sea Ranch in Sonoma County

(a) The Legislature hereby finds and declares that it is in the public interest to provide by statute for the resolution of the lengthy and bitter dispute involving development of existing legal lots within the unincorporated area of Sonoma County, commonly known as the Sea Ranch. The reasons for the need to finally resolve this dispute include:

(1) Acknowledgment by the responsible regulatory agencies that development of existing lots at Sea Ranch can proceed consistent with the provisions of this division and other applicable laws provided certain conditions have been met. Development has been prevented at considerable costs to property owners because these conditions have not been met.

(2) That it has been, and continues to be, costly to Sea Ranch property owners and the public because of, among other reasons, extensive and protracted litigation, continuing administrative proceedings, and escalating construction costs.

(3) The need to provide additional public access to and along portions of the coast at the Sea Ranch in order to meet the requirements of this division. The continuation of this dispute prevents the public from enjoying the use of such access opportunities.

(4) The commission is unable to refund 118 "environmental deposits" to property owners because coastal development permit conditions have not been met.

(5) It appears likely that this lengthy dispute will continue unless the Legislature provides a solution, and

the failure to resolve the dispute will be unfair to property owners and the public.

(b) The Legislature further finds and declares that because of the unique circumstances of this situation, the provisions of this section constitute the most expeditious and equitable mechanism to ensure a timely solution that is in the best interest of property owners and that is consistent with the requirements of this division.

(c) If the Sea Ranch Association and Oceanic California, Inc. desire to take advantage of the terms of this section, they shall, not sooner than April 1, 1981, and not later than July 1, 1981, deposit into escrow deeds and other necessary documents that have been determined by the State Coastal Conservancy prior to their deposit in escrow to be legally sufficient to convey to the State Coastal Conservancy enforceable and nonexclusive public use easements free and clear of liens and encumbrances for the easements specifically described in this subdivision. Upon deposit of five hundred thousand dollars ($500,000) into the same escrow account by the State Coastal Conservancy, but in no event later than 30 days after such deeds and other necessary documents have been deposited in the escrow account, the escrow agent shall transmit the five hundred thousand dollars ($500,000), less the escrow, title, and administrative costs of the State Coastal Conservancy, in an amount not to exceed twenty thousand dollars ($20,000), to the Sea Ranch Association and shall convey such deeds and other necessary documents to the State Coastal Conservancy. The conservancy shall subsequently convey such deeds and other necesary documents to an appropriate public agency that is authorized and agrees to accept such easements. The deeds specified in this subdivision shall be for the following easements:

(1) In Unit 34A, a 30-foot wide vehicle and pedestrian access easement from a point on State Highway 1, 50 feet north of mile post marker 56.75, a day parking area for 10 vehicles, a 15-foot wide pedestrian accessway from the parking area continuing west to the bluff-top trail, and a 15-foot wide bluff-top pedestrian easement beginning at the southern boundary of Gualala Point County Park and continuing for approximately three miles in a southerly direction to the sandy beach at the northern end of Unit 28 just north of Walk-on Beach together with a 15-foot wide pedestrian easement to provide a connection to Walk-on Beach to the south.

(2) In Unit 24, a day parking area west of State Highway 1, just south of Whalebone Reach, for six vehicles, and a 15-foot wide pedestrian accessway over Sea Ranch Association common areas crossing Pacific Reach and continuing westerly to the southern portion of Shell Beach with a 15-foot wide pedestrian easement to connect with the northern portion of Shell Beach.

(3) In Unit 36, a 30-foot wide vehicle and pedestrian accessway from State Highway 1, mile post marker 53.96, a day parking area for 10 vehicles, and a 15-foot wide pedestrian accessway from the parking area to the beach at the intersection of Units 21 and 36.

(4) In Unit 17, adjacent to the intersection of Navigator's Reach and State Highway 1, 75 feet north of mile post marker 52.21, enough land to provide day parking for four vehicles and a 15-foot wide pedestrian accessway from the parking area to Pebble Beach.

(5) In Unit 8, a 30-foot wide vehicle and pedestrian accessway from State Highway 1, mile post marker 50.85, a day parking area for 10 vehicles and a 15-foot wide pedestrian accessway from the parking area to Black Point Beach.

(6) With respect to each of the beaches to which access will be provided by the easements specified in this subdivision, an easement for public use of the area between the line of mean high tide and either the toe of the adjacent bluff or the first line of vegetation, whichever is nearer to the water.

(7) Scenic view easements for those areas specified by the executive director, as provided in subdivision (d), and which easements allow for the removal of trees in order to restore and preserve scenic views from State Highway 1.

(d) The executive director of the commission shall, within 30 days after the effective date of this section, specifically identify the areas along State Highway 1 for which the scenic view easements provided for in paragraph (7) of subdivision (c) will be required. In identifying the areas for which easements for the restoration and preservation of public scenic views will be required, the executive director shall take into account the effect of tree removal so as to avoid causing erosion problems. It is the intent of the Legislature that only those areas be identified where scenic views to or along the coast are unique or particularly beautiful or spectacular and which thereby take on public importance. The restoration and preservation of the scenic view areas specified pursuant to this subdivision shall be at public expense.

(e) Within 30 days after the effective date of this section, the executive director of the commission shall specify design criteria for the height, site, and bulk of any development visible from the scenic view areas provided for in subdivision (d). Such criteria shall be enforced by the County of Sonoma if the deeds and other necessary documents specified in subdivision (c)

have been conveyed to the State Coastal Conservancy. Such criteria shall be reasonable so as to enable affected property owners to build single-family residences of substantially similar overall size to those which property owners who are not affected by these criteria may build or have already built under the Sea Ranch Association's building design criteria. The purpose of such criteria is to ensure that development will not substantially detract from the specified scenic view areas.

(f) On and after the date on which the deeds and other necessary documents deposited in escrow pursuant to subdivision (c) have been conveyed to the State Coastal Conservancy, no additional public access requirements shall be imposed at the Sea Ranch pursuant to this division by any regional commission, the commission, any other state agency, or any local government. The Legislature hereby finds and declares that the provision of the access facilities specified in this subdivision shall be deemed adequate to meet the requirements of this division.

(g) The realignment of internal roads within the Sea Ranch shall not be required by any state or local agency acting pursuant to the provisions of this division; provided, however, that appropriate easements may be required by the County of Sonoma to provide for the expansion of State Highway 1 for the development of turnout and left-turn lanes and for the location of a bicycle path, when the funds are made available for such purposes. The Legislature finds and declares that the provisions of this subdivision are adequate to meet the requirements of this division to ensure that new development at the Sea Ranch will not overburden the capacity of State Highway 1 to the detriment of recreational users.

(h) No coastal development permit shall be required pursuant to this division for the development of supplemental water supply facilities determined by the State Water Resources Control Board to be necessary to meet the needs of legally permitted development within the Sea Ranch. The commission, through its executive director, shall participate in the proceedings before the State Water Resources Control Board relating to such facilities and may recommend terms and conditions that the commission deems necessary to protect against adverse impacts on coastal zone resources. The State Water Resources Control Board shall condition any permit or other authorization for the development of such facilities so as to carry out the commission's recommendation, unless the State Water Resources Control Board determines that any such recommended terms or conditions are unreasonable. This subdivision shall become operative if the deeds and other necessary documents specified in subdivision (c) have been conveyed to the State Coastal Conservancy.

(i) Within 90 days after the effective date of this section, the commission, through its executive director, shall specify criteria for septic tank construction, operation, and monitoring within the Sea Ranch to ensure protection of coastal zone resources consistent with the policies of this division. The North Coast Regional Water Quality Control Board shall review such criteria and adopt it, unless it finds such criteria or a portion thereof is unreasonable. The regional board shall be responsible for the enforcement of any such adopted criteria if the deeds and other necessary documents specified in subdivision (c) have been conveyed to the State Coastal Conservancy.

(j) Within 60 days after the date on which the deeds and other necesary documents deposited in escrow

pursuant to subdivision (c) have been conveyed to the State Coastal Conservancy, the commission shall refund every Sea Ranch "environmental deposit" together with any interest earned on such deposit to the person, or his or her designee, who paid such deposit.

(k) Notwithstanding any other provision of law, on and after the date on which the deeds and other necessary documents deposited in escrow pursuant to subdivision (c) have been conveyed to the State Coastal Conservancy, a coastal development permit shall not be required pursuant to this division for the construction of any single-family residence dwelling on any vacant, legal lot existing at the Sea Ranch on the effective date of this section. With respect to any other development for which a coastal development permit is required within legally existing lots at the Sea Ranch, no conditions may be imposed pursuant to this division that impose additional public access requirements or that relate to supplemental water supply facilities, septic tank systems, or internal road realignment.

(l) Notwithstanding any other provision of law, if on July 1, 1981, deeds and other necessary documents that are legally sufficient to convey the easements specified in subdivision (c) have not been deposited in an escrow account, the provisions of this section shall no longer be operative and shall have no force or effect and thereafter all the provisions of this division in effect prior to enactment of this section shall again be applicable to any development within the Sea Ranch.

(m) The Legislature hereby finds and declares that the provisions for the settlement of this dispute, especially with respect to public access, as set forth in this section provide an alternative to and are equivalent to the provisions set forth in Section 30610.3. The

Legislature further finds that the provisions of this section are not in lieu of the permit and planning requirements of this division but rather provide for an alternative mechanism to Section 30610.3 for the resolution of outstanding issues at the Sea Ranch.

§30610.8. Hollister Ranch; public access program; in-lieu fee; additional conditions to permits; implementation

(a) The Legislature hereby finds and declares that a dispute exists at the Hollister Ranch in Santa Barbara County with respect to the implementation of public access policies of this division and that it is in the interest of the state and the property owners at the Hollister Ranch to resolve this dispute in any expeditious manner. The Legislature further finds and declares that public access should be provided in a timely manner and that in order to achieve this goal, while permitting property owners to commence construction, the provisions of this section are necessary to promote the public's welfare.

(b) For purposes of Section 30610.3 and with respect to the Hollister Ranch public access program, the in-lieu fee shall be five thousand dollars ($5,000) for each permit. Upon payment by the applicant for a coastal development permit of this in-lieu fee to the State Coastal Conservancy for use in implementing the public access program, the applicant may immediately commence construction if the other conditions of the coastal development permit, if any, have been met. No condition may be added to a coastal development permit that was issued prior to the effective date of this section for any development at the Hollister Ranch.

(c) It is the intent of the Legislature that the State Coastal Conservancy and the State Public Works Board

utilize their authority provided under law to implement, as expeditiously as possible, the public access policies and provisions of this division at the Hollister Ranch in Santa Barbara County.

(d) Notwithstanding provision 2 of category (2) of Item 3760-490-721 of the Budget Act of 1984, all in-lieu fees received pursuant to this section shall be deposited in the State Coastal Conservancy Fund and shall be available for appropriation to the conservancy for the purposes specified in subdivision (d) of Section 5096.151.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on July 24, 1985, I served the within *Jurisdictional Statement* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

John K. Van De Kamp,
Atty Gen.
N. Gregory Taylor,
Asst. Atty Gen.
Peter H. Kaufman,
Dep. Atty Gen.
110 West A Street
Suite 700
San Diego, California 92101

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 24, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

No. 85-159

Supreme Court, U.S.
FILED
SEP 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

ALVIN J. REMMENGA and SYLVIA REMMENGA,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the California Court of Appeal,
Second Appellate District, Division Six

MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM

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No. 85-159

IN THE

Supreme Court of the United States

October Term, 1985

ALVIN J. REMMENGA and SYLVIA REMMENGA,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the California Court of Appeal,
Second Appellate District, Division Six

MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

The California Coastal Commission, appellee herein, respectfully moves this Honorable Court to dismiss the appeal now pending or, in the alternative, to affirm the decision of the California Court of Appeal, Second Appellate District, Division Six on the following grounds:

(a) The questions on which decision of the cause depends are insubstantial and do not require further argument. The same issues have already been presented to this Court in the relatively recent appeals of *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, et al.*, (1971) 404 U.S. 878 and *Jordan et al. v. Village of Menomonee Falls*, (1966) 385 U.S. 4. In each case, the appeal was dismissed for want of a substantial federal question;

(b) The questions presented are so dependent upon a unique factual situation that any substantive significance they might have is too isolated and circumscribed to benefit anyone but Hollister Ranch property owners. (*Rice v. Sioux City Cemetery* (1954) 349 U.S. 70, 74.) Moreover, the statutes under attack in this appeal are part of a regulatory scheme which, in addition to requiring in lieu fees, also authorizes payment of compensation. (See Cal. Pub. Resources Code, § 30610.3; Decision, Juris. Statement, Appen. A, pp. A-23 — A-25.) This regulatory scheme has not yet run its course. Hence, appellants' taking claim is likely premature. (*Williamson Planning Comm'n. v. Hamilton Bank* (1985) __ U.S. __ [105 S.Ct. 3108].)

STATEMENT OF THE CASE

This appeal is an attack on statutes designed to preserve a public right of access to the sea guaranteed by a state constitution.

Under article X, section 4 of the California Constitution,[1] no upland owner may interfere with the public's right of access to the sea. To ensure this constitutional right is fully protected, the California Legislature is empowered to enact all laws necessary to make public access forever attainable.

Reacting to numerous government studies and the fears expressed by the electorate in an initiative measure,[2] the California Legislature saw the inexorable intensification of land uses in proximity to the state's shoreline as a process which threatened to make state tidelands the private preserve of a select few. To carry out its constitutional responsiblity to prevent the public's exclusion from these lands, the Legislature enacted section 30212 of the California Coastal Act of 1976, section 30000 et seq. of the California Public Resources Code ("Act"). This provision is applied during the process of issuing development permits and requires that certain projects provide public access from the nearest public roadway to the shoreline and along the coast.[3] However, also included within

---

[1] Article X, section 4 provides in pertinent part:

> "No individual, partnership, or corporation claiming or processing the frontage or tidal lands of . . . navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, . . . and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

[2] In 1972, the People of California approved Proposition 20 as an initiative measure and thereby enacted into law the California Coastal Zone Conservation Act, section 27000 et seq. of the California Public Resources Code. This act was designed, in part, to protect public access to the coast.

[3] Section 30212 provides in pertinent part as follows:

> "Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects . . . ."

the Act are three specialized provisions designed by the Legislature as mechanisms for achieving the public access requirements of section 30212 in areas where complicated ownership patterns prevent developers from quickly meeting these requirements. (See §§ 30610.3, 30610.6 and 30610.8; Juris. Statement, Appen. H.) It is the validity of these specialized provisions which is at issue in this appeal.

The first provision is section 30610.3. It requires the payment of in lieu fees for the purpose of acquiring accessways in an area where the developer does not, by himself, own the property which would otherwise be required for access, but rather shares such ownership in common with others. In essence, individual property owners provide their fair share of the funds necessary to purchase or condemn the required accessways and are then reimbursed when the property is purchased or condemned.[4] In this fashion roughly the same result is achieved as if the original subdivider had been required to provide accessways to and along the sea in the subdivision.

The second provision is section 30610.8. It sets the in lieu fee required by section 30610.3 at $5,000 for developers in the Hollister Ranch. Normally an in lieu fee under section 30610.3 would be determined by dividing either the negotiated purchase price of the accessways or their estimated appraised cost for condemnation purposes by the total number of lots involved. However, in appellants' case, it was set by the Legislature, in section 30610.8 of the Act, after the association representing appellants and other owners sought to block implementation of section 30610.3 by refusing, among other things, to allow government appraisers entry to the area.

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[4] It should be noted that some property owners will be reimbursing the state rather than vice versa. For example, if the state purchases or condemns access easements before a property owner is ready to develop, then the owner will receive compensation *before* being required to pay the in lieu fee.

The third provision is section 30610.6.[5] This section was enacted by the Legislature to settle a "lengthy and bitter dispute" over the public access requirements of the Act between the state and property owners in another coastal subdivision, known as "the Sea Ranch."[6] Under the terms of this compromise, the property owners agreed to settle all outstanding disputes with the state and to immediately provide dedicated public accessways. In turn, the state agreed to pay the owners $500,000. Appellants have neither asked for nor been denied an opportunity to settle their dispute with the state on the same or a similar basis. Indeed they have rejected all settlement proposals to date.

Appellants challenged the constitutionality of sections 30610.3 and 30610.8 in the California courts on the grounds they constituted a taking of property and a denial of equal protection of the laws. The California Court of Appeal rejected both contentions. Citing numerous government studies demonstrating public ". . . tidelands have been walled off from public access by private development," it held no taking had been shown because:

> ". . . the Legislature had ample basis upon which to conclude that construction of the proposed improvement between the first public road and the coast in combination with improvement of other lots in that area, would have a cumulative adverse impact on the public's constitutional right of access. . . ." (Decision, Juris. Statement, Appen. A, p. A-8.)

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[5] Appellants do not challenge the validity of section 30610.6; rather they assert that its existence gives rise to their equal protection claim against sections 30610.3 and 30610.8.

[6] The enactment of section 30610.6 and the Sea Ranch owners' compliance with its terms was the basis of this Court's decision to remand an appeal of the three-judge district court decision in *Sea Ranch Ass'n v. California Coastal Com'n* (N.D. Cal. 1981) 527 F.Supp. 390, 396. (See 454 U.S. 1070, Memorandum No. 81-335 so that the district court could determine whether the decision had been rendered moot.) In its initial decision, the district court had upheld the constitutionality of imposing access conditions in the Sea Ranch.

Similarly, the court found no denial of equal protection in the Legislature's imposition of the in lieu fee set by section 30610.8 where appellants had refused to settle their dispute with the state on the basis of section 30610.6. As the Court held:

> "The Legislature does not run afoul of the equal protection clause when faced with two parties challenging the same requirements, it agrees to settle the litigation with one party and continues the [*sic*] litigate with another who has refused to agree to the same or a similar compromise." (Decision, Juris. Statement, Appen. A, p. A-12.)

I.

THE ISSUES PRESENTED BY THIS APPEAL ARE SO RUDIMENTARY AS TO REQUIRE NO FURTHER ARGUMENT

Appellants' attack in this case is on principles of constitutional law uniformly applied in California for more than 35 years with which this Court has concurred either by express holdings or through the dismissal of prior appeals. Thus, their appeal raises issues so rudimentary as to require no further argument.

In *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, et al., supra*, 404 U.S. 878, this court concurred with a California Supreme Court decision upholding the constitutionality of an in lieu fee statute where the statute's basis was a legislative perception that the cumulative affect of projects subject to the fee would be adverse to a public constitutional right. Despite this fact, appellants insist that a statutory exaction may not be imposed on a developer unless the proposed project, in and of itself, immediately creates the need for an exaction. (Juris. Statement, p. 11.) Similarly, this Court has repeatedly held that a legislature's factual determinations supporting a statute under

constitutional attack may not be judicially questioned if the Legislature could reasonably believe them to be true. (*Radice v. New York* (1924) 264 U.S. 292; *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49; *Vance v. Bradley* (1979) 440 U.S. 93; *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456.) Yet, appellants insist the California Legislature must have judicially verifiable proof projects will adversely affect public access before an in lieu fee may be required. (Juris. Statement, p. 14.)

Finally, despite the fact there is a strong policy in federal law favoring settlement of litigation (see *Marek, et al., v. Chesny, Individually and as Administrator of the Estate of Chesney* (1985) __ U.S. __ [105 S.Ct. 3012]; *Firefighters Local Union No. 1784 v. Stotts, et al.* (1984) __ U.S. __ [104 S.Ct. 2576]; *Belknap, Inc. v. Hale* (1983) 463 U.S. 491), appellants assert that the goal of terminating litigation does not provide a rational basis for distinguishing between persons subject to suit under the same statute. Instead, they contend the equal protection clause requires government to reject settlement of any suit to enforce a statute unless all persons subject to suit under it agree to the same settlement. Indeed, in appellants' view, the penalty for government's failure to reject a settlement under such circumstances is loss of the ability to continue enforcing the statute against those rejecting the compromise.

Such arguments are so specious as to merit no further consideration by this Court.

A. The California Legislature Could Reasonably Believe the Cumulative Impact of Projects Similar to Appellants' Would Adversely Affect Public Access. Thus, the Statutory Imposition of an Access Condition Is Valid

The Court of Appeal's decision holds unconstitutional any permit condition requiring an applicant to donate property for a

public use that bears no relationship to the burden imposed on the public by the applicant's project. (Decision, Juris. Statement, Appen. A, pp. A-3 — A-4.) However, if a rational relationship between the condition imposed and the appellant's proposal is made apparent, the condition will be upheld. (*Id.*, at p. A-4.)

i. Exactions May Be Required From Projects Which Cumulatively As Opposed to Immediately Create the Need for the Exaction

Under the California Supreme Court's decision in *Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, this relationship may be established whether or not the project, in and of itself, immediately creates a burden on a public right. Instead, justification for the condition may come from the cumulative impact many such projects will have in the future. As the court held in that case:

> "We see no persuasive reason in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required." (*Id.*, at pp. 639-640.)

In stating this rule, the California Supreme Court did no more than recognize the obvious fact that though the impact of any project may be small or even negligible, those impacts when repeated again and again may have a substantial if not devastating impact

on the public welfare. Thus, it held the public need not remain helpless and defenseless against piecemeal assaults on its rights and interests. (See also, *Jordan v. Village of Menomonee Falls*, (Wis. 1965) 137 N.W.2d 442 where the Wisconsin Supreme Court likewise accepted cumulative impacts as the basis of an in lieu fee statute.)

As noted above, by its dismissal of the appeals in *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, et al., supra*, 404 U.S. 878; and *Jordan et al. v. Village of Menomonee Falls, supra*, 385 U.S. 4, this Court concurred.

ii. Judicial Examination of a Statute Under Constitutional Attack Is Complete When It Appears the Legislature Could Reasonably Believe the Facts Supporting the Statute Are True

The Court of Appeal also correctly recognized that a legislative determination of the existence of a threat to the public welfare need not be supported by judicially verifiable proof. (Decision, Juris. Statement, Appen. A, p. A-7.) Instead, judicial review of a statute under constitutional attack is complete when it appears the Legislature could reasonably believe the facts underpinning the regulation are true. (*Vance v. Bradley, supra*, 440 U.S. 93.)

This Court has repeatedly affirmed this rule. In *Paris Adult Theatre I v. Slaton, supra*, 413 U.S. 49, the following principles were expressed:

> "But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind

of state regulation is 'impermissible.' We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. Mr. Justice Brennan, speaking for the Court in *Ginsberg v. New York*, 390 U.S. 629, 642-643 (1968), said: 'We do not demand of legislatures "scientifically certain criteria of legislation." *Noble State Bank v. Haskell*, 219 U.S. 104, 110.' Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. [Citations omitted.]

"From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. [Citations omitted.] The same is true of the federal securities and antitrust laws and a host of federal regulations. [Citations omitted.] On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing 'coupons,' and 'trading stamps,' commanding what they must and must not publish and announce. [Citations omitted.] . . . .

"*Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or*

> *through an existing park or wilderness area. . . . The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.*" (*Id.*, at pp. 60-62; emphasis added.)

Similarly, in a case involving the equal protection clause this Court held:

> "But States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' *Vance v. Bradley*, 440 U.S., at 111. See also *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952); *Henderson Co. v. Thompson*, 300 U.S. 258, 264-265 (1937)." (*Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. at p. 464.)

As noted by this Court in *Vance v. Bradley, supra*, 440 U.S. at page 111, a federal court's:

> "'. . . responsiblity for making "findings of fact" certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was "pure speculation"' *Firemen v. Chicago, R. I. & P. R. Co.*, 393 U.S., at 138-139."

iii. Government Studies Provided the Legislature With Reason to Believe the Cumulative Impact of Projects Such As Appellants' Would Adversely Affect Public Access

In the present case, the Court of Appeal concluded the Legislature had good reason to believe the cumulative impact of projects such as appellants' would adversely affect the public's constitutional right of access. Citing numerous government studies demonstrating that hundreds of miles of publicly owned tidelands had been walled off from public access by private development, the Court held:

> ". . . the Legislature had ample basis upon which to conclude that construction of the proposed improvement between the first public road and the coast, in combination with improvement of other lots in that area, would have a cumulative adverse impact on the public's constitutional right of access. . . ." (Decision, Juris. Statement, Appen. A, p. A-8.)

Government studies such as these have traditionally been regarded as sufficient support for statutes under constitutional attack (*Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. at p. 459.) Indeed, in this case, the Legislature was compelled by law (see former Cal. Pub. Resources Code, §§ 27300 et seq., repealed January 1, 1977) to consider the conclusions of a specific study, the California Coastal Plan, which found that:

> "Along the immediate shoreline homes, businesses and industry have often cut off existing public access to the coastline, have used up available road capacity and off street parking and precluded use of the coastline area for recreation. . . ." (*Id.*, at p. 153.)

In short, consistent with long established principles of constitutional law, the Court of Appeal upheld the constitutionality of the in lieu fee at issue based on its recognition the Legislature could reasonably believe the cumulative impact of projects similar to appellants' would adversely affect the public's constitutional right of access.

B. The California Legislature Had a Rational Basis for Settling With the Sea Ranch Owners While Continuing to Litigate With Appellants. Thus, No Equal Protection Violation Occurred

When, as here, a nonfundamental right is at issue, the equal protection clause requires government to have a rational basis for creating classifications among persons subject to its control. (*New Orleans v. Dukes* (1976) 427 U.S. 297, 303.) The classification must be appropriately designed to further a proper governmental goal (*Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. at 461-462) and it must appear that the Legislature could reasonably believe the facts supporting the classification are true. (*Id.*, at p. 464.)

Here, the California Legislature distinguished between those individuals who wished to continue litigating over the validity of section 30610.3 of the Act and those who did not. As noted by the Court of Appeal, the Legislature's reasons for doing so were founded in the desire to terminate very costly litigation, to eliminate the time, effort and administrative expense of processing hundreds of individual permit applications, and to actually realize public access far sooner than might otherwise have been the case were the procedures set forth in section 30610.3 fully followed. (Decision, Juris. Statement, Appen. A, p. A-10.)

The goals of settling litigation, saving public dollars and achieving access to public tidelands are manifestly proper governmental objectives. Despite the fact they had the burden to do so

(*Minnesota v. Clover Leaf Creamery Co., supra*, 449 U.S. at 464), appellants failed to demonstrate the Legislature could not reasonably beleive the settlement set forth in section 30610.6 of the Act would accomplish these ends.

For these reasons, appellants' equal protection claim is patently untenable.

II.

APPELLANTS' FIFTH AMENDMENT CLAIM IS LIKELY PREMATURE AND ITS RESOLUTION WOULD BENEFIT NO ONE BUT HOLLISTER RANCH OWNERS

As discussed above, appellants' Fifth Amendment claim does not warrant further review. However, even were further consideration appropriate, the questions presented are so dependent upon a unique factual situation that any substantive significance they might have is too isolated and circumscribed to benefit anyone but Hollister Ranch property owners.

In *Rice v. Sioux City Cemetery, supra*, 349 U.S. 70, this Court held it does not sit to "satisfy a scholarly interest" in "intellectually interesting" problems. Likewise, it does not sit ". . . for the benefit of . . . particular litigants." (*Id.*, at p. 74.) Instead, the Court's attention is reserved for issues of special importance which transcend the "academic or episodic." (*Ibid.*)

As discussed above, sections 30610.3 and 30610.8 are specialized measures designed to facilitate the application of a more general provision to a unique factual setting. Section 30610.3 has not been applied elsewhere in California and, by its terms, section 30610.8 applies solely to the Hollister Ranch. Moreover, it is unlikely that the combination of circumstances which called forth these regulations will be repeated anywhere else.

Furthermore, the statutes under attack in this appeal are part of a regulatory scheme which, in addition to requiring in lieu fees, also authorizes payment of compensation. The portions of this process which allow for the payment of compensation have not yet been completed. Thus, it is presently unclear what the ultimate impact on appellants may be. For this reason, appellants' taking claim is likely premature under the rule recently enunciated in *Williamson Planning Comm'n v. Hamilton Bank, supra*, __ U.S. __ [105 S.Ct. 3108]. In that case this Court held that a property owner must first demonstrate that state procedures for obtaining compensation are unavailable or inadequate before a claim under the Fifth Amendment may be brought.

CONCLUSION

The constitutional issues raised by appellants need no further review by this Court. Contrary to their belief, the police power is available to protect the public against piecemeal as well as wholesale assaults on its constitutional rights. Similarly, despite appellants' contention, no court has the power to insist a legislature present judicially verifiable proof to support its view that a threat to the public welfare exists. Finally, nothing in the equal protection clause bars government from terminating suits with those who wish to compromise while continuing litigation with those who do not. Thus, the decision of the Court of Appeal should be affirmed without further argument.

In addition, even if appellants' taking claim were to be considered substantial, its significance is isolated to a narrow set of facts and, thus, does not warrant this Court's attention. Finally, because the compensatory aspects of the regulatory scheme under attack have not yet been completed, appellant's taking claim may

well be premature. For these reasons their appeal should be dismissed.

Respectfully submitted,

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No: 85-159
October Term, 1985

ALVIN J. REMMENGA AND
SYLVIA REMMENGA,

Appellants,

v.

CALIFORNIA COASTAL
COMMISSION,

Appellee.

I, THE UNDERSIGNED, say: I am a citizen of the United States, 18 years of age or over, employed in the County of San Diego in which county the below stated mailing occurred, and not a party to the subject cause. My business address is 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Michael M. Berger, Esq.
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Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 23rd day of September 1985.

There is a delivery service by United States Mail at each place so addressed or regular communication by United states Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, Sept. 23, 1985.

PETER H. KAUFMAN

Subscribed and sworn to before me
this 23rd day of September 1985.

Brenda J. Locke

Notary Public in and for said County and State

OFFICIAL SEAL
BRENDA J. LOCKE
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Exp. Feb. 20, 1988

Supreme Court, U.S.
FILED
OCT 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-159

In the Supreme Court of the United States

October Term, 1984

ALVIN J. REMMENGA and SYLVIA REMMENGA,

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CALIFORNIA COASTAL COMMISSION,

Appellee.

APPEAL FROM
COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

INTRODUCTION

The motion of the Coastal Commission to dismiss or affirm does not discuss the major issues on this appeal. Instead, the Commission:

- ignores the conflict between the opinion below and the opinion of the U.S. Court of Appeals in *Parks v. Watson* (9th Cir. 1983) 716 F 2d 646 (compare JS 10)[1];

[1]The Jurisdictional Statement is cited as "JS."

- insists on living in the past, referring to cases decided 15 and 20 years ago as " . . . relatively recent . . ." (Motion, p 2), thus ignoring important developments in the law since then (compare JS 8-12, 16-18);
- attempts to obscure the importance of the issues at bench by focussing on the specific procedure involved, rather than acknowledging that the core issue is whether government agencies have the power to exact "dedication" of property or payment of money "in lieu" of property as a precondition for an owner to use property;[2]
- sidesteps the anarchy existing in the states (each purporting to be applying the *same* Constitutional protection of property rights) over the extent to which such dedications may be enforced, ranging from the "anything goes" rule of California to the rule in states like New Hampshire and Minnesota where the *same* kind of condition as was approved in this case was likened to "extortion" (*J.E.D. Associates, Inc. v. Town of Atkinson* [NH 1981] 431 A 2d 12, 14) and "grand theft" (*Collis v. City of Bloomington* [Minn 1976] 246 NW 2d 19, 26); and
- generally mis-states the factual and legal background of this case.[3]

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[2]Also ignored is Professor Williams' conclusion that the ability of government agencies to insist on *cash* payment—as at bench—is:

> ". . . one of the few important questions in the whole field of planning law which is as yet unsettled, with the states clearly split down the middle." (5 Williams, *American Land Planning Law* [1985] §156.08 at 360)

[3]By way of illustration, the Commission repeatedly urges that this appeal may be premature, hinting that further proceedings

By refusing to deal with the *real* issues presented by this appeal, and, instead, creating straw issues it would prefer to discuss, the Commission does this Court no service. Rather, the need to so cast its motion admits the bankruptcy of its position and demonstrates the value of this Court setting the case for argument so California may be informed that the Constitutional rights of its property owners cannot be dealt with so cavalierly.

It is easy to see why the Commission doesn't want to talk about the real issue in this case. To do so would expose that California is operating without standards or restraints in the way it treats property owners.

CASE LAW OF THE LAST 20 YEARS DEMONSTRATES THE NEED FOR THIS COURT'S ATTENTION

The Commission's primary point seems to be that this Court need not deal with the issues in this case *now* because, ". . . relatively recent[ly] . . ." (Motion, p 2), this Court dismissed appeals from California and Wisconsin raising generally similar issues.

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may provide compensation. (See Motion, pp 2, 4, 15.) That is false. These proceedings are concluded. If Mr. and Mrs. Remmenga wish to build their home, they *must* pay the $5,000 fee "in lieu" of dedicating coastal access. If, at some future date, some state agency decides to buy access to the coast, those whose property is taken will be paid. But it could hardly be the Remmengas who are far from the coast. And it has nothing to do with this permit proceeding.

A further illustration is the Commission's reliance on Cal. Const. Art. X, §4 as supposed support for the right to coerce coastal access payments from the Remmengas, whose property is a mile inland and separated from the coast by several other ownerships. (See Motion, p 3.) As the Court can see, the quoted Constitutional provision has no application here. It applies only to people ". . . claiming or possesing the *frontage* or *tidal lands* of . . . navigable water. . ." That hardly describes people whose property is a mile inland from the frontage and the tide.

The Commission's analysis ignores the development of the law.

First. Those ". . . relatively recent . . ." decisions were reached in 1966 and 1971.

Second. Neither decision resulted in an opinion from this Court. Indeed, this Court has *never* issued an opinion dealing with the exaction/dedication issues raised by this appeal.

Third. Much has happened in the last 20 years. Among other things, numerous state courts have addressed the issue. As noted at JS 10-12, those decisions—each purporting to enforce the *same* Constitutional protection of property rights—have resulted in a broad diversity of rules.

The right of a property owner in California, who can be forced to "dedicate" property as a condition to obtaining a development permit, even though his proposed development will have no adverse impact on the public, stands in stark contrast to the right of his brother in Illinois. (Compare the case at bench with *Krughoff v. City of Naperville* [Ill App 1976] 354 NE 2d 489.)

The protection accorded in California, where the courts see nothing wrong with imposing substantial financial conditions on the issuance of permits, cannot be reconciled with that given in states like New Hampshire and Wisconsin, which describe such high-handed governmental demands in terms reminiscent of the criminal law. (Compare the case at bench with *J.E.D. Associates, Inc. v. Town of Atkinson* [NH 1981] 431 A 2d 12, 14 ["extortion"] and *Collis v. City of Bloomington* [Minn 1976] 246 NW 2d 19, 26 ["grand theft"].)

Finally. This Court's dismissals of appeals in *Associated Home Builders v. City of Walnut Creek* (1971) 404 US 878 and *Jordan v. Village of Menomenee Falls* (1966) 385 US 4 came at a time when this Court was not reviewing *any* land use decisions.

Since 1971, this Court has recognized the serious Constitutional issues which can be present in cases dealing with restricting rights of ownership. It will be valuable to the economic health of the nation and to the "rule of law" for this Court to address the issues in this case.

WHAT DOES ORAL SEX HAVE TO DO WITH THIS CASE?

The depths to which the Commission feels compelled to sink in order to defend the result reached below is revealed by its heavy reliance on *Paris Adult Theatre I v. Slaton* (1973) 413 US 49. (See Motion, pp 9-11.)

In *Paris Adult Theatre,* this Court dealt with the ability of the Georgia Legislature to enact a statute permitting the state to enjoin exhibition of films dealing graphically with oral and group sex. In *that context,* this Court refused to insist that the legislature engage in heavily detailed fact-finding before concluding that such depictions were not acceptable.

From that springboard, the Commission leaps to the conclusion that *no* legislature need *ever* have more than a general inkling of what it is doing before enacting legislation which impinges on the Constitutional rights of citizens.

Rubbish!

In land use cases, the rule was plainly set forth by the U.S. Court of Appeals in *Parks v. Watson* (9th Cir 1983) 716 F 2d 646, 652:

> "Both case authority and scholarly commentary indicate that a condition requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred."

By definition, a "rational relationship" must have some basis.

Here, the concern is rational development of the California coastal area in a way which balances the rights of the owners of coastal property and other citizens. Before demanding that a particular group of property owners in a specific area *must* pay $5,000 each before being permitted to build *anything* on their land,[4] there should be *some* rational relationship between the proposed development and the $5,000 "donation."

The only rationalization the Commission was able to concoct was that, at *other* times and in *other* places with *different* types of developments, there have been access problems. So stipulated. So what?

California's coast is 1,000 miles long. It stretches nearly two thirds of the way from Mexico to Canada. It contains virgin redwood forests near the Oregon border and the matchless beauty of the Big Sur area as well as the intensely developed areas of San Francisco, Los Angeles, and San Diego.

That there were problems created in the 1920s in the Los Angeles area because homes were permitted to be built on 20 foot wide lots is not rationally related to extorting a $5,000 fee from people like the Remmengas, whose single family "lot" contains 106 *acres*.

---

[4]Please recall, Mr. and Mrs. Remmenga want to put *one* modest 1900 square foot log home on a *106 acre* parcel of land.

Good intentions are irrelevant. So is abstract power. As this Court said in *Kaiser Aetna v. U.S.* (1979) 444 US 164, 174:

> "In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question. [Citation.]"[5]

That it may be a good thing to provide additional access to California's coast (see Motion, pp 2, 3, 4, 12) does not mean the Legislature may achieve that goal any way it wills. As in *Kaiser Aetna,* whether the means constitutes a taking " . . . is an entirely separate question." *That* question is the one before this Court. For the Legislature to answer it Constitutionally, there must in fact exist a rational relationship between the proposed use and the imposed exaction.

CONCLUSION

The Commission's motion demonstrates the need for this Court to set this case for argument. It is a paradigmatic illustration of California's attitude toward the rights of those of its citizens who own property. If the state precedent of this case is permitted to stand, property owners in California can fairly be said to have no rights. If cash tribute can be exacted without rational relationship to the land's use causing a need for public service, then any amount can be charged before any use of one's land. Property owners would be better treated by California if they were accused of crime.

By approving virtually any exaction which a governmental agency wishes to impose on one who

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[5]See also cases discussed at JS 16-18.

applies for permission to use his property, the California judiciary has effectively done away with the concept of private property. For, as this Court noted recently:

> "Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order." (*Dickman v. Commissioner* [1984] ___US___,___, 79 L Ed 2d 343, 349)

If the right to use property is subject to the whim of the Legislature, then the right has disappeared. As this Court enduringly said more than a century ago:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." (*Loan Assn. v. Topeka* [1875] 87 US [20 Wall.] 655, 662)

To assure the primacy of the Constitution, and to restore the courts to their proper role as enforcers of the Constitution, Mr. and Mrs. Remmenga pray that probable jurisdiction be noted.

Respectfully submitted,

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Attorneys for Appellants

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on October 2, 1985, I served the within ***Appellants' Reply to Motion To Dismiss or Affirm*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

John K. Van de Kamp,
Attorney General
N. Gregory Taylor,
Assistant Attorney General
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Deputy Attorney General
110 West A Street
San Diego, California 92101

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 2, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)